Lim Chee Beng & Ors v R Rajasingam & Co (sued as a firm of solicitors) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1162 OF 2008
SULONG MATJERAIE, ABDUL WAHAB PATAIL AND APANDI ALI JJCA
20 DECEMBER 2012

Civil Procedure — Res judicata — Issue estoppel — Trial judge setting aside order made by deputy registrar — Appeal against — Compensation for acquisition of land — Fee agreement touched in petition of costs in the High Court and complaint to disciplinary board under Legal Profession Act 1976 — Petition and complaint were dismissed and appellants did not appeal — Whether appellants' action barred by res judicata and issue estoppel — Rules of the High Court 1980 O 18 r 19 & O 92 r 4

The appellants had appealed against the decision of the learned judge in chambers to allow the appeal by the respondents and to set aside the order made by the deputy registrar. The deputy registrar had dismissed the respondents' application under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 ('RHC') to strike out the appellants' writ and statement of claim. The appellants had sought under the writ, remedies against their advocate and solicitor, R Rajasingam and his firm R Rajasingam & Co. It was asserted that the respondents had represented the appellants in their appeal to the Federal Court in respect of compensation for the acquisition of their land by the Penang State Government in or about December 1991. The compensation awarded by the Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam in June 1992 was at the rate of RM0.90 per sqft. The appellants were told by the second respondent that he would make submissions and obtain compensation of RM3.20 per sqft. The second respondent had persuaded the appellants to sign a letter dated in March 2000 to pay him 50% of any increase. However, the second respondent had entered into a settlement agreement without the knowledge or consent of the appellants for an increase of RM0.70 per sqft or RM4.6m and had taken RM2.3m as his fee. The appellants asserted they had agreed to the 50% on the basis the respondents obtained RM3.20 per sqft, and would not have agreed to pay the respondents 50% if they had known the second respondent had entered into a settlement agreement. The increase of RM0.70 per sqft that arose from a settlement agreement had not been made known to the appellants although they had requested it several times. Hence, the causes of action relied upon by the appellants were, inter alia, negligent and fraudulent representation and unjust enrichment. The appellants contended inter alia, that trial judge in the High Court had taken into consideration the

Petition of Costs No 26-13 of 2005 and the complaint made to the disciplinary board under the Legal Profession Act 1976 where the appellants had touched upon the fee agreement in both forums. Both the petition and the complaint were dismissed and the appellants did not appeal. Hence, the respondents stated that the appellants' action was barred by res judicata and issue estoppel.

Held, allowing the appeal and setting aside the order made by the High Court:

(1) The proceedings and the remedies before the disciplinary board differ from the writ action, the subject of this appeal. The subject of reopening of the fee agreement was touched upon, but the writ action in this case was not founded solely upon a reopening of the fee agreement. It was also founded upon a breach of the fee agreement, that as asserted in the writ, the respondents would make submission and obtain compensation for RM3.20 per sqft, but instead did not do so and settled at an increase of RM0.70 per sqft (see para 9).

(2) In considering whether res judicata or issue estoppel applies because there had been earlier proceedings, it was necessary to examine: (a) the writ sought to be struck out to determine the causes of action being pursued; and (b) the previous proceedings to determine the nature of those proceedings and the remedies that were available under those proceedings. Otherwise, it risks injustice and that would be a failure to exercise judicial consideration objectively (see para 11).

(3) The remedies available and sought under the writ are not available under the disciplinary board proceedings. If a complaint to the disciplinary board acts as a bar to litigation, there would be no complaints to the disciplinary board. And vice versa, civil proceedings would become a bar to complaints to the disciplinary board. That is not the correct law. A person should not risk being barred from civil proceedings for personal remedies by lodging a complaint to the disciplinary board for disciplinary action to be taken but not pursuing the matter further when the disciplinary board dismisses it. Hence, the trial judge erred in holding that res judicata and issue estoppel arose from the determination of the complaint to the disciplinary board (see paras 12–13).

(4) The facts relied upon in the writ are disputed, and findings thereon depend upon an assessment of credibility. These are disputes that do not lend themselves to resolution on the basis of affidavits. Diligent and competent reliance upon the procedures made available under the Rules of the High Court 1980 gives opportunity to check and verify facts relied upon, so that the court can safely rely upon such facts as true and correct, and allow justice to bloom (see para 14).

[Bahasa Malaysia summary

Perayu-perayu telah merayu terhadap keputusan Yang Arif hakim dalam kamar kerana membenarkan rayuan oleh responden-responden dan kerana mengetepikan perintah yang dibuat oleh timbalan pendaftar. Timbalan pendaftar telah menolak permohonan responden-responden di bawah A 18 k 19 dan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan writ dan pernyataan tuntutan perayu-perayu. Perayu-perayu telah memohon di bawah writ tersebut, remedi-remedi terhadap peguambela dan peguamcara mereka, R Rajasingam dan firmanya R Rajasingam & Co. Ditegaskan bahawa responden telah mewakili perayu-perayu dalam rayuan mereka kepada Mahkamah Persekutuan berkenaan pampasan bagi pengambilan tanah mereka oleh Kerajaan Negeri Pulau Pinang pada atau kira-kira Disember 1991. Pampasan yang diberikan oleh Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam pada Jun 1992 adalah pada kadar RM0.90 setiap kaki persegi. Perayu-perayu telah dimaklumkan oleh responden kedua bahawa dia akan membuat penyerahan dan mendapatkan pampasan RM3.20 setiap kaki persegi. Responden kedua telah memujuk perayu-perayu untuk menandatangani surat bertarikh Mac 2000 untuk membayar kepada mereka 50% daripada sebarang peningkatan. Walau bagaimanapun, responden kedua telah memeterai perjanjian penyelesaian tanpa pengetahuan atau persetujuan perayu-perayu bagi peningkatan sebanyak RM0.70 setiap kaki persegi atau RM4.6 juta dan telah mengambil RM2.3 juta sebagai yuran. Perayu-perayu menegaskan bahawa mereka telah bersetuju dengan 50% dengan syarat responden-responden mendapatkan RM3.20 setiap kaki persegi dan tidak akan bersetuju untuk membayar 50% kepada responden-responden sekiranya mereka mengetahui responden kedua telah memeterai perjanjian penyelesaian. Peningkatan sebanyak RM0.70 setiap kaki persegi yang timbul daripada perjanjian penyelesaian tersebut tidak dimaklumkan kepada perayu-perayu walaupun mereka telah diminta beberapa kali. Oleh itu, kausa-kausa tindakan yang disandarkan oleh perayu-perayu adalah, antara lain, perwakilan cuai dan penipuan dan pengkayaan tidak patut. Perayu-perayu menghujahkan antara lain, bahawa hakim bicara di Mahkamah Tinggi telah mengambil kira Petisyen Kos No 26-13 Tahun 2005 dan aduan yang dibuat kepada lembaga tatatertib di bawah Akta Profesion Undang-Undang 1976 di mana perayu-perayu telah menyentuh mengenai perjanjian yuran dalam kedua-dua forum. Kedua-dua petisyen dan aduan telah ditolak dan perayu-perayu tidak membuat rayuan. Oleh itu, responden-responden menyatakan bahawa tindakan perayu-perayu telah terhalang oleh res judicata dan isu estopel.

Diputuskan, membenarkan rayuan dan mengetepikan perintah-perintah Mahkamah Tinggi:

(1) Prosiding dan remedi-remedi di hadapan lembaga disiplin berbeza dengan tindakan writ, iaitu perkara rayuan ini. Subjek pembukaan

semula perjanjian yuran telah dibangkitkan, tetapi tindakan writ dalam kes ini tidak diasaskan semata-mata atas pembukaan semula perjanjian yuran. Ia turut diasaskan atas pelanggaran perjanjian yuran, seperti yang ditegaskan dalam writ, responden-responden akan membuat penyerahan dan mendapatkan pampasan bagi RM3.20 setiap kaki persegi, tetapi sebaliknya tidak berbuat demikian dan memutuskan dengan peningkatan sebanyak RM0.70 setiap kaki persegi (lihat perenggan 9).

(2) Dalam mempertimbangkan sama ada res judicata atau isu estopel terpakai kerana prosiding telah berjalan sebelum ini, adalah perlu untuk memeriksa: (a) writ yang hendak dibatalkan untuk menentukan sebab-sebab tindakan yang diinginkan; dan (b) prosiding yang terdahulu untuk menentukan sifat prosiding tersebut dan remedi-remedi yang terdapat di bawah prosiding tersebut. Jika tidak, ia mempunyai risiko ketidakadilan dan itu akan menjadi satu kegagalan untuk melaksanakan pertimbangan kehakiman secara objektif (lihat perenggan 11).

(3) Remedi-remedi yang tersedia dan yang dipohon di bawah writ tersebut tidak terdapat dalam prosiding lembaga disiplin. Jika aduan kepada lembaga disiplin bertindak sebagai halangan kepada tindakan undang-undang, tidak akan ada aduan kepada lembaga disiplin. Dan sebaliknya, prosiding sivil akan menjadi penghalang kepada aduan kepada lembaga disiplin. Itu bukanlah undang-undang yang betul. Seseorang tidak perlu berisiko terhalang daripada prosiding sivil bagi remedi-remedi peribadi dengan membuat aduan kepada lembaga disiplin agar tindakan disiplin diambil tetapi tidak meneruskan perkara tersebut dengan lebih lanjut apabila lembaga disiplin menolaknya. Oleh itu, hakim bicara terkhilaf dalam memutuskan bahawa res judicata dan isu estopel timbul daripada pemutusan aduan kepada lembaga disiplin (lihat perenggan 12–13).

(4) Fakta-fakta yang disandarkan dalam writ dipertikaikan, dan keputusan-keputusan mengenainya bergantung kepada penilaian terhadap kredibiliti. Ini adalah pertikaian-pertikaian yang tidak memberi penyelesaian atas dasar afidavit. Sandaran teliti dan kompeten ke atas prosedur yang tersedia di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 memberi peluang untuk memeriksa dan mengesahkan fakta yang disandarkan, agar mahkamah boleh dengan selamat bergantung kepada fakta-fakta tersebut sebagai benar dan betul, dan membolehkan keadilan ditegakkan (lihat perenggan 14).]

Notes

For cases on issue estoppel, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7210–7229.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Daewoo Corp v Bauer (M) Sdn Bhd (No 2) [1999] 3 MLJ 417; [1999] 2 CLJ 23, HC (refd)

Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)

Legislation referred to

Legal Profession Act 1976

Rules of the High Court 1980 O 18 r 19, O 92 r 4

Appeal from: Civil Suit No 22–618 of 2006 MT(1)

RK Nathan (Vinod Kamalanathan & Associates) for the appellants.

Harpal Singh Grewal (K Kirubakaran and Joseph Yeo with him) (AJ Ariffin Yeo & Harpal) for the respondents.

Abdul Wahab Patail JCA:

[1] The appellants appealed against the decision of the learned judge in chambers made on 3 September 2008 to allow the appeal by the respondents and to set aside the order made by the deputy registrar on 28 December 2007. The deputy registrar had dismissed the respondents' application by summons in chambers in encl 8 under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 to strike out the appellants' Writ and Statement of Claim No 22–618 of 2006.

[2] The appellants had sought under the writ remedies against their advocate and solicitor R Rajasingam and his firm R Rajasingam & Co. It was asserted that:

(a) the defendants had represented the appellants in their appeal to the Federal Court in respect of compensation for the acquisition of their land by the Penang State Government in or about December 1991;

(b) the compensation awarded by the *pentadbir tanah* Daerah Seberang Perai Tengah Bukit Mertajam in June 1992 was at the rate of RM0.90 per sqft;

(c) their appeal to the High Court was dismissed on 12 September 1995;

(d) their appeal to the Court of Appeal was dismissed in February 1997;

(e) they appealed to the Federal Court in 1998 where they were represented by the respondents;

(f) the appellants were told by the second respondent that he would make submissions and obtain compensation of RM3.20 per sqft;

(g) the second respondent had persuaded the appellants to sign a letter dated in March 2000 to pay him 50% of any increase;

(h) but the second respondent had entered into a settlement agreement without the knowledge or consent of the plaintiffs for an increase RM0.70 per sqft or RM4,600,000 and had taken RM2,300,000 as his fee;

(i) the appellants asserted they had agreed to the 50% on the basis the respondents obtained RM3.20 per sqft, and would not have agreed to pay the defendants 50% if they had known the second defendant had entered into a settlement agreement;

(j) that the increase of RM0.70 per sqft arose from a settlement agreement had not been made known to the appellants although they had requested it several times; and

(k) the appellants only obtained a copy of the order of the Federal Court sometime in June 2005.

[3] The causes of action relied upon were, inter alia, negligent representation, fraudulent representation and unjust enrichment.

[4] The grounds set out by the respondents as defendants in their application at encl 8 to strike out the writ are:

(a) the plaintiffs had received the compensation awarded by the Federal Court;

(b) the plaintiffs had failed in the following proceedings under the Legal Profession Act 1976:

(i) Penang High Court Petition of Costs 26–13 of 2005 to challenge the fee agreement; and

(ii) complaint IT-05–1550 to the disciplinary board;

(c) the plaintiffs' action is barred by res judicata and issue estoppel; and

(d) the plaintiffs are harassing the defendants.

[5] The first and the fourth grounds if accepted as grounds to strike out a writ would change the law. The second ground provides the factual foundations to the objections of res judicata and issue estoppel in the third ground. The question is whether the causes of action now raised could or ought to have been or had been raised in those earlier proceedings set out in ground 2. If they were,

then *Daewoo Corp v Bauer (M) Sdn Bhd (No 2)* [1999] 3 MLJ 417; [1999] 2 CLJ 23 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 apply.

[6] The learned judge in the High Court took into consideration the Petition of Costs No 26–13 of 2005 and the complaint made to the disciplinary board under the Legal Profession Act 1976. The appellants touched upon the fee agreement in both forums. Both the petition and the complaint were dismissed and the appellants did not appeal. In particular the learned judge noted that in the petition of costs, the High Court had held there was no special circumstances in that case which required the fee agreement to be reopened.

[7] Having directed himself correctly upon *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 that it is only in plain and obvious cases that recourse could be had to the summary process under O 18 r 19 and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable', the learned judge concluded that the appellants' writ was a plain and obvious warranting a striking out because the grounds of res judicata and issue estoppel applied. The learned judge concluded these grounds applied on the following basis:

> The decision of the disciplinary board although being of an inferior tribunal was constituted and conferred jurisdiction by the Legal Profession Act 1976. As such the effect of such decision would constitute res judicata. The test to be applied in determining whether the decision of a tribunal, which is not a court, is capable of constituting res judicata is whether it has jurisdiction derived either from statute or from submission of parties, to decide finally a question arising between the parties before it (see *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697).
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> The disciplinary board proceedings were proceedings that took place pursuant to a complaint by the plaintiffs and therefore the investigative tribunal and the disciplinary board derived its jurisdiction from statutory provisions of ss 100–101 of the Legal Profession Act 1976. I therefore find that the doctrines of res judicata and issue estoppel apply.
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> In the light of these circumstances I find the plaintiffs' claim to be frivolous, vexatious and therefore an abuse of the courts process. I accordingly strike out the plaintiffs' action.

[8] The basis of the decision by the learned judge, therefore, is the proceeding of the disciplinary board.

[9] With respect, the proceedings before the disciplinary board differ from the writ action the subject of this appeal. The remedies differ. The subject of reopening of the fee agreement was touched upon, but the writ action in this

case, as the summary above discloses, is not founded solely upon a reopening of the fee agreement. It is also founded upon a breach of the fee agreement, that as asserted in the writ, the respondents would make submission and obtain compensation for RM3.20 per sqft, but instead did not do so and settled at an increase of RM0.70 per sqft.

[10] We observe that if RM3.20 per sqft were obtained, then the compensation amount would be over RM21m. With the settlement at an additional RM0.70, the total obtained was RM0.90 plus RM0.70 equals RM1.60, which is half of what, if true, the appellants were led to believe they would obtain. In essence, the argument is if the appellants received an increase of about RM15m, they were willing to let the respondents have half, but were unwilling to do so if they obtained only RM4.6m. Hence if true, there is a considerable difference.

[11] We do not intend to go into a minute and protracted examination of the documents and facts of this case in order to see whether the appellants had a cause of action (see *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 at p 88). It does not mean the court should simply conclude that because there were previous proceedings, res judicata and issue estoppel applies and therefore the writ is obviously unsustainable and should be struck out. In considering whether res judicata or issue estoppel applies because there had been earlier proceedings, it is necessary to examine (a) the writ sought to be struck out to determine the causes of action being pursued, and (b) the previous proceedings to determine the nature of those proceedings and the remedies that were available under those proceedings. Otherwise, it risks injustice by throwing out the grain with the chaff. That would be a failure to exercise judicial consideration objectively.

[12] The remedies available and sought under the writ are not available under the disciplinary board proceedings. If a complaint to the disciplinary board acts as a bar to litigation, there would be no complaints to the disciplinary board. And vice versa, civil proceedings would become a bar to complaints to the disciplinary board. We do not think that is correct law. A person should not risk being barred from civil proceedings for personal remedies by lodging a complaint to the disciplinary board for disciplinary action to be taken but not pursuing the matter further when the disciplinary board dismisses it.

[13] We find therefore that the learned judge erred in holding that res judicata and issue estoppel arose from the determination of the complaint to the disciplinary board.

[14] The facts relied upon in the writ are disputed, and findings thereon

depend upon an assessment of credibility. These are disputes that do not lend themselves to resolution on the basis of affidavits. Diligent and competent reliance upon the procedures made available under the Rules of the High Court gives opportunity to check and verify facts relied upon, so that the court can safely rely upon such facts as true and correct, and allow justice to bloom like the lotus flower rising from the wet and muddy swamp.

[15] With this finding, it is unnecessary to address other issues which we think are best left to the parties to take up in the trial.

[16] Accordingly, we allowed the appeal and set aside the order of the learned judge in chambers in the High Court.

Appeal allowed and orders made by High Court.

Reported by Ashgar Ali Ali Mohamed